United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

34/35

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

NO. 21,569

DAVID PROCTOR,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Whether the trial judge erred in denying defendant's motion for a judgment of acquittal at the conclusion of the Government's case-in-chief because of his holding that the testimony of the two Government witnesses was sufficiently definite in identifying the defendant so that a reasonably prudent juror could believe him to be a participant in the robbery without a reasonable doubt?

2. Whether the defendant's constitutional rights were violated because he was without the services of counsel when he was identified by the Government's chief witness and because of the improper manner in which the identification may have been conducted?

3. Whether the trial judge erred in failing to conduct a Jackson hearing with respect to an alleged admission by the defendant?

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STATUTES

MISCELLANEOUS

*Cases or authorities chiefly relied upon are marked by asterisks.

JURISDICTIONAL STATEMENT

Appellant was tried in August 1967 in the United States District Court for the District of Columbia and convicted of three counts of robbery. The Trial Court allowed his petition for leave to appeal *in forma pauperis*. This Court has jurisdiction over the appeal by virtue of 28 U.S.C. § 1291.

STATEMENT OF FACTS

On the morning of July 12, 1966 a Safeway store located at 1731 7th Street, N.W., Washington, D. C. was robbed by four men of $2,019.00. Initially three men entered the store. One of them approached the store manager, Robert Arkadie, in the rear of the store and ordered him to open the safe located by the front door. (V.I, T.24-26) While Arkadie was opening the safe, the other two robbers were seen taking the money from the cash registers at the checkstands. (V.I, T.21-22, 43-44) As these three robbers were in the process of leaving the store, a fourth man appeared.* Stepping into the store, he ordered every one to lie down on the floor. He

*While there is conflicting testimony in the record as to whether the three were in the process of having or had already left when this man appeared, V.I, T.9 (Davis), 21 (Arkadie), this disparity is of no particular consequence in this appeal.

then proceeded to check Lindon Davis' cash register and thereupon turned and fled. The lookout for this group, who forced every one to the floor at gunpoint after the other three fled from the store, was found by the court below to be the appellant. Two days after the robbery an arrest warrant was executed. Subsequently the Grand Jury returned an indictment filed in the United States District Court for the District of Columbia (Crim. No. 1167-66) on October 10, 1966, charging the appellant with three counts of robbery in violation of § 22-2901 (D. C. Code, 1967). On October 21, 1966, he was arraigned and pleaded not guilty to all counts. After a mistrial in July 1967, he was again tried in August and the jury returned a verdict of guilty on all counts. On October 27, 1967, the appellant was sentenced to serve one to three years' imprisonment on each count with the sentences running concurrently. It is from this conviction that this appeal is taken.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

District of Columbia Code, Title 22, Section 2901:

> Whoever by force or violence, whether against resistance or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than 15 years.

District of Columbia Code, Title 22, Section 105:

> In prosecutions for any criminal offense all persons advising, inciting or conniving at the offense, or aiding and abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact, the law heretofore applicable in cases of misdemanor only shall apply to all crimes, whatever the punishment may be.

Federal Rules of Criminal Procedure 29(a):

> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficent to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Constitution of the United States:

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

Amendment V (Cont.)

person subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT OF POINTS

1. The Trial Court erred in not granting defendant's motion for a judgment of acquittal because, at the conclusion of the Government's case-in-chief, a reasonably prudent juror could not possibly have believed beyond a reasonable doubt that the defendant participated in the robbery.

2. The defendant's constitutional rights were violated when a pre-trial identification was conducted without counsel and without proper procedural safeguards.

3. The Trial Court erred in not conducting a Jackson hearing on the voluntariness of the defendant's alleged admission.

SUMMARY OF ARGUMENT

I

The basic question to be decided in this case is whether the defendant was in fact the perpetrator of the crime charged. To establish his complicity in the crime, the Government proffered the testimony of three eyewitnesses - two of whom identified the defendant in court. Before these latter two witnesses identified the defendant in court, the prosecution failed to establish by clear and convincing evidence that this identification was based upon the witness' observation of the accused at the commission of the crime. Failure to present such evidence requires a judgment of acquittal. Even when the totality of their testimony is examined, it cannot be said that the Government's evidence was capable of supporting a conviction beyond a reasonable doubt.

II

While the police have a legitimate interest in conducting line-ups, they must not be conducted in such a manner as to cause undue prejudice to the rights of the defendant. One of the safeguards against a prejudicial pretrial confrontation is the presence of counsel. The record in this case indicates a situation where a defendant may have been unduly prejudiced - a short man being forced to stand in a line-up with men considerably taller.

Hence counsel should have been present to guarantee that the identification occurred in an atmosphere that was not permeated with suggestability to the identifying witness.

Furthermore the record is not clear that the identification occurred during a line-up. It may have in fact been made in a robbery squad office. If a line-up is fraught with the possibility of a mistaken identification, a fortiori an identification made in a squad office may be even more prejudicial and absence of counsel may seriously impair the defendant's constitutional rights.

III

Before a trial court permits the Government to use an admission by the defendant to rebut the latter's testimony, a hearing must be conducted to determine the voluntariness of the admission. Because the Court below permitted testimony relating to defendant's admission to reach the jury without an evidentiary hearing, this constituted reversible error. The impropriety of allowing such inadmissible evidence into the case becomes more serious when the Government employed the inadmissible evidence to undermine the defendant's alibi defense.

ARGUMENT

I

The Court Below Erred in not Granting the Motion for Judgment of Acquittal Because the Identification of the Defendant was not Based upon Sufficient Facts to Identify Him as the Man at the Scene of the Robbery.

The basic question before this Court, as it was the Court below, is whether the defendant, David Proctor, was the same man who acted as the lookout for the Safeway robbery on July 12, 1966. There can be no question that the evidence was overwhelming that the store was in fact robbed on that date by three gunmen and we are not contending here that the fourth man who came into the store as the others were leaving was not an accomplice. The defense below was that the defendant was not that fourth man and the basic question before this Court is whether in the Government's case-in-chief its witnesses sufficiently identified the defendant so that a jury could, without a reasonable doubt, believe the defendant to be the fourth man. It is submitted that even taken in its best light the evidence given by the prosecution's witnesses prior to the defendant's motion for a judgment of acquittal was so indefinite that an intelligent juror must have had a reasonable doubt that the defendant and the fourth man were one and the same.* Hence the

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* This statement is not contradicted by the fact that the jury did eventually find the defendant guilty. A motion for a judgment of acquittal must be judged at the point of time that it is made. A trial judge cannot deny such a motion in anticipation that other evidence may turn up as the trial proceeds.

trial judge erred in not granting the motion for a judgment of acquittal.

There can be no greater miscarriage of justice than to convict a man for a crime which he did not commit. See Gregory v. United States, 369 F.2d 185, 190 (D.C.Cir.1966) Because the identification of the perpetrator of a crime by witnesses who see him only briefly under conditions of extreme emotional stress is particularly susceptible to error, it is incumbent upon the courts to exercise the utmost diligence to insure that the man sitting as the defendant in a courtroom is in fact the same individual who was present at a crime which took place a considerable period in the past. In the instant case the Government produced three eyewitnesses to the crime. One of these witnesses, Hilda Quick, did not even testify that the fourth man came into the store, limiting her testimony to the three men who actually took the money from the cash register. She testified that she could not identify any of the three men because she was so frightened. (V.I, T-45) Another of the Government's witnesses, Lindon Davis, saw the fourth man only for approximately 30 seconds, and the third eyewitness to the robbery, Robert Arkadie, was vague in detailing the appearance of the fourth man.

The mere fact that an eyewitness identifies the accused in the courtroom is of little testimonial significance in itself. 4 Wigmore, Evidence, § 1130, 208 (3d ed.1940) Even a perfect

stranger coming into a courtroom easily can identify the man seated at a table next to one who is obviously a lawyer as the defendant in the case. To make an in-court identification meaningful, testimony relating to such corporeal features as height, weight, complexion, clothing or any other peculiarly identifiable characteristics should appear in the record before the witness identifies the defendant for the jury. Such testimony would not only indicate the witness' ability to observe adequately but would prevent real prejudice to the defendant. If an identification is made without such testimony, the jury's attention is focused on the defendant and any testimony subsequent to the identification would be considered by a jury as relating to the defendant seated in the courtroom although the identification of the defendant has been incomplete and he may be completely innocent.

To make such identification meaningful and to prevent conviction of the wrong man because of mistaken identity, the prosecution must show by clear and convincing evidence prior to the in-court identification that such identification is based upon the witness' observation of the accused at the commission of the crime. United States v. Wade, 388 U.S. 218,240 (1967); Wright v. United States, U.S. App. D.C. No. 20153 (January 31, 1968) The Government in its case-in-chief failed to present clear and convincing testimony that the defendant was the fourth

man in this robbery before asking the prosecution witnesses to make an in-court identification of the lookout.

The first witness called by the prosecution was a checkout clerk, Lindon Davis, who merely stated that a "young fellow" came to the door of the Safeway and ordered every one to lie on the floor. (V. I, T-9)* Asked by the prosecution to identify this "young fellow", Davis pointed to the defendant. (V.I, T-10) Except for this reference to the youthfulness of the lookout, the record is completely devoid of any testimony by Davis with respect to any other identifiable characteristics of this "other fellow". No attempt was made to indicate the approximate height or weight of the fourth man. Nor did Davis indicate any peculiar facial characteristics that would cause him to remember this "other fellow" as the defendant Proctor.** Indeed, it is somewhat questionable whether this witness in fact had an adequate opportunity under the circumstances to observe the fourth man. By his own testimony, he asserted that he looked at this fourth man "about 30 seconds". (V.I, T-10)

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* Davis also referred to this "young fellow" as the "other fellow" prior to his in-court identification. (V.I, T-9)

** According to Davis, he looked into the front portion of this "fellow's" face. (V.I, T-11).Yet the record is barren as to whether this confrontation impressed upon Davis' mind any peculiar characteristic which would identify Proctor.

The infirmity that infects the testimony of Mr. Davis likewise pervades the testimony of the Government's second eyewitness, Robert Arkadie. Before Mr. Arkadie identified the defendant in court, the Government made no attempt to describe any of the four robbers. He was merely asked:

> "Q. Would you tell us how many people were involved [in the robbery]?
>
> A. Four.
>
> Q. Of those four people, do you see any one of those four persons in this courtroom today . . . ?
>
> A. Yes." (V.I, T-20)

With these questions as the sole basis for establishing the identity of the fourth man, Arkadie thereupon identified the defendant. The record is barren of any testimony as to any peculiar corporeal characteristics which would serve as a basis for the in-court identification. This failure to proffer such evidence prior to identification in itself demands that the conviction be reserved and a judgment of acquittal entered for this defendant.

Such reversal is even more compelling when the testimony of the two identifying witnesses is examined in totality. Not only was the evidence prior to identification deficient but even afterwards it was insufficient to identify the defendant beyond a reasonable doubt.*

* However, the fact that a complete description of the defendant is made after the identification does not cure the error caused by deficient evidence prior to identification. Wright v. United States, supra.

The only specific details which Davis related concerning the fourth man after the in-court identification was the type of gun which the latter employed. (V.I, T-11) Indeed, the gun itself seems to have been an item of extraordinary interest to the witness. On redirect examination the prosecution concentrated on buttressing the testimony of Davis as to the identification of Proctor. Rather than eliciting any peculiar corporeal characteristics of Proctor, the prosecutor focused on the witness' considerable interest in the weapon. (V.I, T-18) This positive identification that the robber had brandished an "automatic Beretta" should not be considered as a substitute for identifying the culprit.*

Mr. Arkadie's subsequent testimony hardly implicated Proctor as the fourth man. Although he said he was "approximately ten or twelve feet" away from the fourth man (V.I, T-22), Arkadie admitted on cross-examination by the defendant's attorney that he did not recall what the fourth man was wearing. In fact, he admitted that he "would have remembered the next day but this [robbery] was a year ago . . . ."(V.I, T-36)** Although

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* This case would be in a different posture if the gun had been found and the fingerprints of the accused were on the gun. In this record, no gun was introduced into evidence by the prosecution and there is no indication that any gun, in fact, was found. Even the witness' memory for guns, a subject in which he had great interest (V.I, T-11, 15) is suspect because he originally called the "automatic Berretta" a "revolver". (V. I, T-9)

** Even when asked to describe the apparel of the three principal actors, he could only remember that one wore a blue T shirt. The robber who approached him could not be described even though at one time he was directly in front of the manager. (V.I, T-35-36)

the witness claimed that he "particularly observe[d]" the lookout's face and features (V.I, T-33), there is nothing in Mr. Arkadie's testimony referring to any distinguishing characteristics which would impress upon the witness' mind that the fourth man and the defendant were the same person.* Mr. Arkadie's powers of observation may have been impaired because, as he admitted on cross-examination, "to a certain degree, I was afraid". (V.I, T-34)

At the end of the prosecution's case-in-chief, the defendant's trial counsel appropriately made a motion for judgment of acquittal on the ground of no actual identification of the defendant as a participant in the robbery. (V.I, T-59) While the trial judge recognized his obligation to apply the test enunciated by this Court in Curley v. United States, 160 F.2d 229 (D.C. Cir.), cert. denied, 331 U.S. 837 (1947); accord, Crawford v. United States, 375 F.2d 332 (D.C. Cir. 1967), he erred by denying the defendant's motion.

From the foregoing analysis of the Government's case-in-chief, it appears that a reasonable man must necessarily have a reasonable doubt about the identity of the defendant. As

* The witness did testify after he identified the defendant in court that the lookout was young. (V.I, T-38) This is hardly a distinguishing characteristic that would set apart the defendant from others. After Arkadie testified to the lookout's youthfulness, he admitted again his inability to remember the apparel worn by the lookout. (V.I, T-39)

discussed above, the prosecution did not bring forward clear and convincing evidence of the witness' basis for identifying the defendant in court and the testimony it did adduce surely raises, or should raise, a reasonable doubt in the mind of a reasonable man. The identification of a gun hardly suffices as an identification of the accused and an identification based upon such vague and limited evidence as the testimony of Mr. Arkadie hardly could be a substitute. While a judge must view the Government's evidence in the most favorable light, together with the inferences that can be reasonably drawn, Crawford v. United States, supra; Curley v. United States, supra, he cannot allow a case to reach the jury where the evidence raises an inherent reasonable doubt. In this case a jury could only surmise and speculate that the defendant was, indeed, the lookout. Whenever the evidence is incapable of supporting a conviction and a conviction would rest upon speculation, the trial court must grant a motion for judgment of acquittal. Curley v. United States, supra at 232; F. R. Crim. P. 29(a)

II.

Lack of Counsel at the Police Line-Up Resulted in a Denial of Due Process to Defendant.

After being arrested at his residence on July 12, 1966, the defendant was taken to the local precinct station where he was identified by Government witness Arkadie as the fourth man who was connected with the Safeway robbery. (V.1, T-29-30) Witness Arkadie, who was the more positive of the two Government witnesses who identified the defendant at the trial, testified that when he saw the defendant at the police station there were several men of varying heights present. The record does not suggest to the contrary and it is the understanding of counsel, that during this period when the initial identification of the defendant was made by Mr. Arkadie, he was without the services of counsel.

In the recent Supreme Court case of United States v. Wade, 388 U.S. 218 (1967), which had a strikingly similar factual situation to the instant case, the identification of the defendant in such a line-up without the presence of counsel was held to be reversable error. In the Wade case the defendant, who had recently robbed a bank, was placed in a line-up with five or six other prisoners and identified by two bank employees who had been present at the holdup. The bank robber had had a small strip of tape on each side of his face and each of the individuals in the line-up wore strips of tape and each said something like "put the money in the bag", the words allegedly used by the robber.

Both bank employees identified the defendant in the line-up as the bank robber.

The Court of Appeals for the Fifth Circuit and the Supreme Court reversed the conviction because the line-up, being held without counsel, (the defendant had hired a lawyer at that point),violated the defendant's Sixth Amendment right to assistance of counsel. The absence of counsel in itself was held to be sufficient to constitute a denial of defendant's constitutional rights. In Wade the Supreme Court laid down the rule that it must:

> "scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." 388 U.S. at 227.(Emphasis in original)

The Court continued that the confrontation compelled by the state in Wade (as in the instant case):

> "between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbally untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent - not due to the brutalities of ancient criminal procedure.'" 388 U.S. at 228.

The Supreme Court continued by quoting several legal authorities whose comments are as much applicable to the instant case as to the Wade case:

> "[t]he influence of improper suggestion on identifying witnesses probably accounts for more miscarriages of justice than any other single factor - perhaps it is responsible for more such errors than all other factors combined . . . It is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial." 388 U.S. at 229

Finally, the Supreme Court observed that line-ups present a particular hazard in robbery prosecution because "a victim's understandable outrage may excite vengeful or spiteful motives",388 U.S. at 230, and that the conduct of pretrial confrontations for identification are potentially prejudicial to the accused where "tall suspects have been made to stand with short nonsuspects." 388 U.S. 232. (Obviously, in the present situation where a short suspect has been made to stand with tall nonsuspects the prejudice is just as great) In a case decided the same day, Stovall v. Denno, 388 U.S. 293, 297 (1967), the Supreme Court reiterated its holding in Wade that a "conviction which rests on a mistaken identification is a gross miscarriage of justice."

The circumstances in the instant case strongly indicate that there was unfairness to the defendant because of the manner in which the "line-up" was conducted and, hence, lack of counsel resulted in a very real denial of his constitutional rights. Witness Arkadie said the men were between "five feet, six, to six feet, one or two." (V.II, T-30) Clearly the de-

fendant who is very small of stature should have been put in a line-up with others of similar size and not placed with men who were as much as six feet, one or two inches in height resulting in exactly the type of prejudice which so concerned the Supreme Court in Wade. On their face the facts of the instant case appear even stronger than Wade for in that case there is no evidence that there was any disparity in size between the persons in the line-up.

Moreover, there is much that is not clear from the record in the instant case which raises the posibility of another situation even more prejudicial to the defendant. Although the Government attorney stated that two officers would testify to certain admissions made by the defendant during the course of the line-up. (V.I, T-107), it is not at all clear that the identification was in fact made during the course of a line-up. In its opposition to motion for a new trial, the Government indicates that no line-up was held at the time that Mr. Arkadie made his identification of the defendant and in fact such identification occurred in the robbery squad office.

If, as it appears, the identification by Mr. Arkadie was in fact made in the robbery squad office rather than during a formal line-up, such safeguards which even a defective line-up might have provided were absent. For example, when Mr. Arkadie went into the office the defendant could have been the only person present in civilian clothes, he may have been the only person of short stature present, or in some other manner his appearance

may have set him apart from the others in the room.* Faced with this situation, Mr. Arkadie may well have been psychologically inclined to single out the defendant. While we cannot be sure of any of these factors, we do not have to speculate that identification of a defendant in a robbery squad office is fraught with the possibility of mistaken identity. There can be no serious question that once an individual, even if innocent, is pointed out as the perpetrator of a crime by an impartial, albeit mistaken, observer, his situation immediately becomes a perilous one.

In summary, it is submitted that Wade v. United States, supra, requires a remand of this case on the basis that the defendant was denied his right to counsel under the Sixth Amendment. The facts in Wade reveal that although there was nothing inherently unfair in the manner in which the line-up was conducted, absence of counsel alone was sufficient for both the Court of Appeals and the Supreme Court to order a reversal. In the instant case, viewing the evidence in the best possible light and assuming there was a line-up in which the defendant was identified by witness Arkadie, the evidence on its face reveals considerable variation in the

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* In Wright v. United States, supra, this Court was disturbed by a lack of detail surrounding an identification made at a precinct station. "We are uninformed as to the characteristics by which [the eyewitness'] . . . observation served to distinguish appellant from other persons. We know relatively little as to the similarities and the differences, respecting appellant and those in the room with him, in age, height, weight, dress, and other physical features. We are not clear as to whether the contested identification was made before or after appellant was asked to stand." (Slip opinion at 7.) This Court considered such "relevant details" essential to a determination of whether an irreparable mistaken identification occurred. The record in this case likewise is devoid of such detail to assess the fairness of the identification of the defendant by an eyewitness.

height of the members of the line-up thereby singling out the defendant who, like the fourth man at the robbery, was unusually small in stature. As has been pointed out, the Supreme Court singled out such differences in height among members of a line-up as one of the potential abuses which could occur if counsel were not present to protect the defendant's rights. If the defendant deserved counsel in Wade, a fortiori the defendant in the instant case required a lawyer at the line-up to insure that his constitutional rights would be protected.

III

The Government Should be Precluded From Using Prior Inconsistent Statements Whose Voluntariness was not Determined in Accordance with Jackson v. Denno.

The defendant testified at the trial that during the entire day of the robbery, July 12, 1966, he was working for his uncle, Alfred Brown, installing panelling in a building in the 1400 block of New York Avenue, N.W., Washington, D. C. and, hence, could not possible have participated in the crime at a Safeway store in the 1700 block of Seventh Street, N.W., some distance away. (V.I, T-98-99) The prosecution sought to rebut this testimony by the statement of Officer Blancato that the defendant told him when he was arrested on July 14, 1966 that he had not worked for three weeks prior to that date. (V.II, T-40) Hence, the Government brought into the case the issue of an admission by the defendant relating to a vital element of the case, his alibi.

In the landmark decision of Jackson v. Denno, 378 U.S. 368 (1964), the Supreme Court required that a trial judge make an independent determination of the voluntariness of a confession before admitting it into evidence. Id. at 391. The rule of Jackson is equally applicable to an admission. Miranda v. Arizona, 384 U.S. 436, 476-77 (1966)*

* The Supreme Court in Miranda was quite explicit in saying that no distinction should be drawn between direct confessions and statements which amount to an admission since the Fifth Amendment "does not distinguish degrees of incrimination." 384 U.S. at 476. On another occasion, the Supreme Court has noted that "an accused's admissions of essential facts or elements of the crime, subsequent to the crime, are of the same character as confessions" and applied the rules relating to confessions to admissions. Opper v. United States, 348 U.S. 84, 90 (1954); accord Smith v. United States, 348 U.S. 147 (1954).

The trial judge failed to make such an independent determination of the voluntariness of the defendant's admission as required by Jackson even though he recognized that a Jackson hearing might be necessary (V.II, T-21) Instead the trial judge erroneously relied on Brown v. United States, 356 U.S. 148 (1958) and Walder v. United States, 347 U.S. 62 (1959) and held that a Jackson hearing was unnecessary. (V.II, T-22-23)

Where either an admission or confession is sought to be used, the trial court must conduct a hearing on its voluntariness. This Court has followed the rule that such a preliminary hearing must be conducted even when there is a lack of a request by the defendant. Woody v. United States, 379 F.2d 130, 132 (D.C. Cir.),cert. denied, 88 Sup.Ct. 342 (1967) (dissenting opinion); Proctor v. Anderson, 361 F.2d 557 (D.C.Cir. 1966); Curtis v. United States, 349 F.2d 718 (D.C. Cir.1965). See also United States v. Inman, 352 F.2d 954, 956 (4th Cir. 1965). An independent determination of the voluntariness of an admission or confession is so critical in protecting the rights of the accused that this Court in Curtis required such a hearing where it found that "[t]he record tends to support defense trial counsel's original view that no issue of voluntariness was thought to exist . . . ." 349 F.2d at 719. If a Jackson hearing had been held and the statement found to be involuntary, the prosecution would not have been able to use Officer Blancato's evidence to rebut the defendant. Thus the defendant's statement relating to his basic defense, his alibi, would have had considerably more weight with the jury.

The Tate-Walder doctrine (Walder v. United States, supra; Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960)) which holds that government evidence which is otherwise inadmissible can be used to challenge the truth and reliability of a defendant's perjurious assertions as to collateral matters, is not applicable here. This doctrine seeks to reconcile two competing policies (1) the policy which requires truthful testimony on the part of witnesses in the judicial process; and (2) the policy which prohibits the use of evidence obtained in violation of a rule of law. 283 F.2d at 379. To avail itself of the doctrine and have its evidence admitted, the Government must establish that the testimony it seeks to rebut is collateral to the main elements of the case. In the instant case the fact that the defendant was working some distance from the scene of the crime at the time the robbery was committed was Proctor's whole defense. A denial of presence at the scene of the crime can scarcely be deemed collateral matter since it is essentially a denial of every element which the Government seeks to prove. The averments of the defendant go directly to the issue of guilt or innocence, not simply his credibility as a witness. Johnson v. United States, 344 F.2d 163, 166 (D.C. Cir. 1964) Thus, the determination of the voluntariness of the admission was necessary because if it was involuntary, it could not be used to rebut the testimony of the defendant.

The lower court's reliance on the Brown decision is misplaced. In that case, the petitioner attempted to plead the Fifth Amendment on cross-examination but the trial court compelled her to answer. Persisting in her refusal to answer, the district court found her in contempt of court and this conviction was appealed. The Supreme Court affirmed the conviction holding that the privilege against self-incrimination cannot be invoked on cross-examination regarding matters which had been testified to on direct examination.

The Brown case has no relation to this case. First, the defendant Proctor at no time during his testimony attempted to invoke the guarantee of the Fifth Amendment's privilege against self-incrimination during cross-examination by the Government. Secondly, Brown has absolutely no connection with the requirements of a voluntariness hearing. That decision, rendered prior to Jackson, sought to balance the interests of the Government and the defendant by allowing the former to test through cross-examination the veracity of the latter's testimony. A hearing under Jackson is directed to the issue of admissibility of evidence and not to the issue of when the privilege guaranteed by the Fifth Amendment can be invoked.

Thus, a voluntariness hearing as required by Jackson v. Denno, supra, should have been held before allowing the testimony of Officer Blancato to be admitted. Such a hearing was even more important because of the serious questions about the prosecution's

presentation of a prima facie case. See pp. 8-15 , supra. The Government should not be allowed to bolster a weak case by introducing evidence whose admissibility was questionable.

CONCLUSION

For the foregoing reasons, it is submitted that Appellant's conviction should be reversed and the case remanded to the court below for appropriate action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served appellant's brief upon each of the following parties in this proceeding by mailing a copy thereof properly addressed to the counsel of record of the party named:

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May 29, 1968

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REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 21,569

DAVID PROCTOR,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATUTES

*Cases or authorities chiefly relied upon are marked by asterisks.

INTRODUCTION

The Government brief seeks to rebut the arguments raised in our initial brief primarily by relying on alleged technical errors of appellant's trial counsel. The Government contends that because we now argue that the motion for judgment of acquittal should have been granted for different reasons than were advanced below , we should not be heard. Although we are in fact repeating essentially the same argument as was made below, the important question for this court is not whether trial counsel raised or did not raise a particular argument but whether the appellant's constitutional rights were safeguarded by the trial court. Again in Part II of its argument the Government maintains that appellant waived any objection to identification testimony because his counsel did not specifically object at the time of trial.

By the Government's reasoning an individual unlettered in the law is estopped from raising legal errors on appeal if his counsel fails to observe all the legal niceties which someone with hindsight looking over his shoulder thinks appropriate. If the individual is fortunate enough to be represented by skilled counsel who makes all the necessary objections, then the Government would agree that this Court can consider alleged errors on review. -Obviously this reasoning is directly contrary to the trend of the law as expressed in cases such as Gideon and Escobedo. Contrary to the Govern-

ment's position, if the counsel is less skilled or employs incorrect trial tactics, then more, not less, care should be taken by the reviewing court to ensure justice.

ARGUMENT

I

The Court Below Erred in not Granting the Motion for Judgment of Acquittal

The Government's brief seeks to challenge the appellant's contention that the basic question in this case is the identification of the appellant as the lookout in the Safeway robbery on the basis that: (1) an appellate court may not weigh the evidence adduced at trial; and (2) an appellate court cannot review the sufficiency of the evidence where no objection was made below.

While it is axiomatic that an appellate court cannot substitute its own judgment for that of the jury, this is no answer to the argument we have raised regarding the identification of the appellant. A correct reading of our initial brief makes it perfectly clear that we are not asking this court to weigh evidence presented to the jury* but to rectify legal errors made by the lower court. The first of these was the error of law made by the trial judge when he refused to grant the motion of acquittal. (App. br. pp. 8-15) The appellant's trial counsel clearly questioned

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* Our point is that even if all the prosecution's evidence is taken in its best light, an identification of the appellant as the perpetrator of the robbery could not be made beyond a reasonable doubt.

the substantiality of the evidence in this record by a motion for judgment of acquittal. In this appeal, we contend that, even if the evidence were taken in its best light, no reasonable juror would find that the appellant was the lookout and to deny the motion was an error of law. (App. br. p. 8)

In our initial brief, we reviewed the evidence introduced by the Government before the in-court identification was made. (Pp.11-12) The record was completely barren of any testimony relating to any peculiar corporeal features which would serve as a basis for such an identification. Evidence given subsequent to the in-court identification, even if it had been sufficient, came too late to remedy the trial judge's legal error in permitting the identification. However, even if the testimony subsequent to the in-court identification would remedy any deficiency in the testimony prior to the identification, an analysis of the record again demonstrates that the Government witnesses failed to testify as to specific details which would implicate the defendant as the fourth man in the robbery. One witness Davis testified concerning the gun the lookout brandished. (App. br. p. 13) A detailed description of the gun is hardly a substitute for a description of the lookout and is not sufficient evidence to single out the appellant as the perpetrator of the crime.

Witness Arkadie's testimony likewise was deficient. Although he claimed he was within ten to twelve feet of the lookout, he did not testify to any corporeal feature that could be the basis for identifying the appellant as the lookout. (App. br. pp. 13-14) Although the Government contends that both of these witnesses were close to the robber and had time enough "to fasten [their] . . . attention upon identifying characteristics" (Gov. br. p. 8), neither witness did, in fact, testify to any distinguishing characteristics. With such insufficient evidence, the jury could only speculate about the guilt or innocence of the appellant and this is clearly impermissible. When the evidence below is insufficient to warrant a verdict, this Court should reverse the decision below. Glasser v. United States, 315 U.S. 60, 80 (1942); Wigfall v. United States, 230 F.2d 220, 221 (D.C. Cir. 1956).

The Government argues that the appellant is precluded from raising any argument with respect to sufficiency of the evidence because, in its view, nowhere did appellant's counsel "suggest that the identifications . . . were too vague." (Gov. br. p. 8) Appellant's counsel below properly made a motion for a judgment of acquittal at the end of the Government's case-in-chief on the same grounds as the appellant's contention on appeal: The Government's witnesses failed to identify the appellant as one of the robbers.

(V. I, T. 59) While the Government tries to argue that "[n]owhere did counsel suggest that the identifications of appellant were too vague"(Gov. br. p. 8), in fact, counsel for the appellant made an even stronger argument - no identification was made.

The Government also argues that it should not be required to produce clear and convincing evidence prior to an in-court identification that the witness' identification is based upon the observation of the accused at the commission of the crime because to adopt this as a general rule "would be impractical and unreasonable." (Gov. br. p.8) The adoption of such a rule is neither impractical nor unreasonable and, in fact, is essential to protect individuals from being mistakenly identified. The Government itself gives justification for the imposition of such a rule when it points out that "[v]ery subtle factors enter into one person's identification of another." (Ibid.) Because various factors enter into an identification, the court should not read United States v. Wade, 388 U.S. 218 (1967), and Wright v. United States, U.S. App. D.C. No. 20153 (January 31, 1968) narrowly and limit those cases to their particular facts. The Government's narrow construction argument is not supported by this Court's or the Supreme Court's opinions. The burden upon the Government is not unreasonable since even the Government argues in its

brief that the eye-witnesses Arkadie and Davis had an opportunity to observe. (Gov. br. p.8) Hence, evidence of physical features would have been easy to produce. Yet the record is completely barren of such testimony. Furthermore, the burden in the instant case is no greater than the burden imposed in Wade and Wright.

One final observation must be made. The Government contends that to adopt such a rule would in effect require a preliminary determination of a witness' credibility, thereby causing an invasion into an area traditionally reserved for the jury. This contention, however, misconstrues the thrust of the rule. To require that the Government elicit clear and convincing evidence that the witness saw the defendant at the commission of the crime before an in-court identification is made is merely to insure that its witnesses had an opportunity to observe the perpetrator of the crime and thereby could identify him with reasonable certainty. Without such testimony, a jury's attention might be focused on a person who may be completely innocent. Thus, such a rule would not only assure the witness' ability to observe but would prevent real prejudice to the defendant. The trial court would merely be obligated to ascertain whether the opportunity to observe existed and would not be compelled to weigh the credibility of the witness as the Government suggests.

II

Pretrial Identification Procedures
Denied Appellant Due Process

In our initial brief we pointed out that after being arrested at his residence on July 12, 1966, the defendant was taken to the local precinct station where he was identified by Government witness Arkadie as the fourth man who was connected with the Safeway robbery. (V.I, T. 29-30) Witness Arkadie, who was the more positive of the two Government witnesses who identified the defendant at the trial, testified that when he saw the defendant at the police station there were several men of varying heights present. The record does not suggest to the contrary and it is the understanding of counsel, that during this period when the initial identification of the defendant was made by Mr. Arkadie, he was without the service of counsel.

In the recent Supreme Court case of United States v. Wade, supra, which had a strikingly similar factual situation to the instant case, the identification of the defendant in such a line-up without the presence of counsel was held to be reversable error. While the Supreme Court announced in Stovall v. Denno, 388 U.S. 293 (1967), that the Wade decision was to have only prospective application, the Stovall Court confirmed the proposition that a pretrial confrontation may be "so unnecessarily suggestive and conducive

to irreparable mistaken identification" that a defendant may be denied due process of law. 388 U.S. at 302. An accused may litigate this issue despite the non-retroactivity of the Wade decision, Hemphill v. United States, U.S. App. D.C. No. 21,432 (June 12, 1968); Wright v. United States, supra; Wise v. United States, 383 F.2d 206, 209 (D.C. Cir. 1967), cert. denied, 88 Sup. Ct. 1069 (1968).

Absence of counsel at a pretrial confrontation constitutes such a denial of due process of law unless there are circumstances which assure the reliability of the identification. Wise v. United States, supra. In this case, however, there were no circumstances assuring the reliability of the identification. For example, there was no confrontation close to the time or the place of the offense and, in fact, it appears that the pretrial identification was made some time after the commission of the crime. Further, the appellant noted that he suffered undue prejudice at a line-up conducted after his arrest. (App. br. pp. 18-19) Witness Arkadie indicated that the men who were in the line-up were about six feet tall while the defendant is small in stature. Such a discrepancy in height was one of the things which disturbed the Supreme Court in Wade. If counsel were present, such prejudice might have been obviated.

The Government again resorts to technical grounds to foreclose inquiry into whether the appellant was denied due process when it states that,because the identification issue was not raised at the trial,it cannot now be raised on appeal. (Gov. br. pp.10-12) While the Government is correct in asserting that objections normally should be made at trial to preserve the right to contest an issue in this court, this rule is not without exception. Rule 52(b) of the Federal Rules of Criminal Procedure clearly provides that this court can recognize errors or defects affecting substantial rights of the appellant although no objection was made at trial. The Supreme Court has recognized this inherent power of appellate courts where "the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." United States v. Atkinson, 297 U.S. 157, 160 (1936); accord Silber v. United States, 370 U.S. 717 (1962); Payton v. United States, 222 F.2d 794 (D.C. Cir. 1955).

A denial of due process resulting from absence of counsel at a pretrial confrontation permeated with undue suggestibility obviously constitutes such plain error that this court should not hesitate to recognize it despite counsel's failure to object below. A procedural technicality should not be used to thwart protection of constitutionally guaranteed rights.*

*In one case, McAffee v. United States, 105 F.2d 21 (D.C.Cir.1939), this court noted that no objection had been raised to the trial court's failure to give instruction prayed for by the defendant. The court also noted that no comment was made upon this omission either in the briefs or oral argument to the court. Nonetheless, the McAffee court took the liberty to recognize such error despite the lack of objection by counsel at trial or on appeal. Id. at 29-30.

The record is unclear whether the identification was in fact made at a line-up. In its opposition to the appellant's motion for a new trial, the Government stated the identification occurred in the robbery squad office. If this were the case, the prejudice is even greater. (App. br. pp. 19-20) The Government makes, however, no attempt to resolve this confusion in its brief. Rather, it asserts that the record "reveals nothing about the circumstances of that . . . identification [before trial], and again relies on the failure of appellant's counsel to "ventilate the issue." (Gov. br. pp. 11-12) However, this court should not permit the Government to rely on such technicalities when constitutional rights may have been violated. Identification in a robbery squad office is fraught with the possibility of mistaken identity and a person in such a situation is indeed in a perilous one.

The Government revealingly indicates that it has little faith in its own arguments when it concedes that this court may find merit in the contentions of the appellant and, in such an eventuality, suggests a remand of this case for a hearing on the circumstances surrounding the pretrial identification. This is entirely proper. Cf. Smith v. United States, U.S. App. D.C. No. 20,773 (June 7, 1968). Perhaps at such a hearing the Government can explain whether the identification occurred at a line-up or in the robbery squad office as it indicated in its opposition to the appellant's motion for a new trial.

III

The Trial Court Erred in Failing to Hold a Jackson Hearing to Determine the Voluntariness of Appellant's Admission.

The defendant testified at the trial that during the entire day of the robbery, July 12, 1966, he was working for his uncle, Alfred Brown, installing panelling in a building in the 1400 block of New York Avenue, N.W., Washington, D.C. and, hence, could not possibly have participated in the crime at a Safeway store in the 1700 block of Seventh Street, N.W., some distance away. (V.I, T. 98-99) The prosecution sought to rebut this testimony by the statement of Officer Blancato that the defendant told him when he was arrested on July 14, 1966 that he had not worked for three weeks prior to that date. (V.II, T. 40) Hence, the Government brought into the case the issue of an admission by the defendant relating to a vital element of the case, his alibi.

In the landmark decision of Jackson v. Denno, 378 U.S. 368 (1964), the Supreme Court required that a trial judge make an independent determination of the voluntariness of a confession before admitting it into evidence. The Government's final contention that the lower court did not err in declining to hold a voluntariness hearing required by Jackson v. Denno, 378 U.S. 368 (1964), is not well founded. To validate its position, it argues: (1) Woody v. United States, 379 F.2d 130 (D.C. Cir. 1967), renders such a hearing

unnecessary; and (2) since the statement of the appellant was a prior inconsistent statement (rather than an admission) which went beyond a denial of complicity in the crime, the Tate-Walder* doctrine renders it admissible. These arguments are unconvincing and should be rejected.

The appellant's statement to Officer Brancato was an admission notwithstanding the Government's charge that the appellant's characterization was as such erroneous. (Gov. br. p. 15) "Anything that is said or done by a party may generally be used against him as an admission, so long as it is inconsistent with contentions later advanced at trial." Employers Mut. Cas. Co. v. Mosqueda, 317 F.2d 609, 612 (5th Cir. 1963) (Emphasis added); accord, Cox v. Esso Shipping Co., 247 F.2d 629, 632 (5th Cir. 1957). The appellant's statement made to Officer Brancato that he did not work for three weeks squarely fits this definition of an admission since it was inconsistent with his testimony at trial that he was working some distance away at the time the crime was committed. Since the statement was an admission, Miranda v. Arizona, 384 U.S. 436, 476-77 (1966), requires that a Jackson hearing be held, there being no distinction between confessions and admissions. (App. br. p. 22)

*Walder v. United States, 347 U.S. 62 (1954); Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960).

The Government, however, argues that Woody v. United States, supra, obviates the necessity of such a hearing because the appellant admitted that the statement was voluntary. First, the mere fact that the appellant admits that a statement was made voluntarily does not necessarily mean the statement is voluntary. Voluntariness is a legal conclusion requiring a judicial determination rather than a determination by a layman. In a voluntariness hearing a judge would naturally consider the appellant's admission that the statement was voluntarily made but it is only one of many factors given consideration.

Secondly, Woody, as pointed out in Chief Judge Bazelon's dissent, seems contrary to the holdings of the Supreme Court in Lee v. Mississippi, 332 U.S. 742 (1948) and Boles v. Stevenson, 379 U.S. 43 (1964) despite the Woody court's disclaimer of any conflict. 379 F.2d at 132 n.3.* In Lee, the Supreme Court invalidated a conviction, holding that a conviction which rests upon a coerced confession "is no less void because the accused testified . . . he never in fact confessed. . . ." 332 U.S. at 745. The Mississippi

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*Further, the evidence of the defendant's guilt was so overwhelming in Woody (He was caught "red-handed".) that the admission was far less damaging than in the instant case.

Supreme Court had adopted the same reasoning as that of the Woody court, id. at 744,* and the disposition of the case by the Supreme Court attests to the invalidity of that reasoning. Because the holding of Woody is questionable in light of the Lee decision, the Government's position should be rejected and error found because of the lack of a Jackson hearing.**

If a voluntariness hearing had been held and the admission was found to be inadmissible, the Government could not employ this evidence to rebut the defendant under the Tate-Walder doctrine. The appellant's testimony that he was working at the time the robbery was an explicit denial of complicity and was not testimony relating to matters independent of the offense charged.

*The Mississippi Supreme Court stated: "'If the accused had not denied having made any confession at all, we would feel constrained to reverse the conviction herein . . . . But, we think that one accused of crime cannot be heard to say that he did not make a confession at all, and at the same time contend that an alleged confession was made under the inducement of fear.'" 332 U.S. at 744

**The Government argues that Guido v. United States, 251 F.2d 1 (7th Cir.), cert. denied, 356 U.S. 950 (1958) is directly in point (Gov. br. p. 16) Such reliance is questionable on two grounds. First, there is nothing to indicate that the appellant in Guido raised the issue of voluntariness; his argument was that the rebuttal testimony was prejudicial. 251 F.2d at 5. Second, Guido was decided six year before the Supreme Court decision in Jackson v. Denno, supra. Therefore, the lack of a voluntariness hearing is understandable and its validity as precedent is dubious in light of the mandate of the Supreme Court for a judicial determination of voluntariness.

The decision of this court in Johnson v. United States, 344 F.2d 163 (D.C. Cir. 1964), is directly in point. In Johnson, the appellant on direct examination denied the robbery charge against him. On cross-examination the Government asked him whether he had admitted the commission of the crime to a police officer. Johnson denied making such a statement; thereupon the Government called the officer who testified that the statement had been made. Noting that Johnson's statement to the police was inadmissible on the basis of Ricks v. United States, 334 F.2d 964 (D.C. Cir. 1964), this court stated that the principal issue in the case was whether the Government could properly use the confession in rebuttal because it fell within the Tate-Walder exception. Finding that the appellant made no sweeping claims but rather "merely offered his own version of the events charged in the indictment," 344 F.2d at 166, the Johnson court concluded that:

> "To permit the Government to introduce illegally obtained statements which bear directly on a defendant's guilt or innocence in the name of 'impeachment' would seriously jeopardize the important substantive policies and functions underlying the established exclusionary rules." Id. (Emphasis added)*

*In the instant case, the Government has sought to avoid a Jackson hearing by claiming that the introduction of an admission by appellant going to the very heart of the issue of guilt was offered merely to impeach his testimony.

The facts of the instant case are strikingly similar to those in Johnson. Like Johnson, the appellant attempted to present "his version" of the events and interjected no matters collateral to the issues in the case. His statement that he was working at the time the robbery occurred was a denial of every element which the Government had to prove. Thus, the determination of the voluntariness of the appellant's admission was essential because, if it was found to be involuntary, it could not be used to rebut the appellant's testimony as Johnson indicates.

This conclusion is reinforced by this court's recent holding in Blair v. United States, U.S. App. D.C. No. 21,034 (May 2, 1968). In that case, one of the co-defendants offered an alibi defense to the robbery charge. In rebuttal, a police officer was allowed to testify to statements made by the defendant at police headquarters with respect to his activities prior and subsequent to the crime. Before making these statements the appellant had not been warned of his right in accordance with Miranda v. Arizona, supra. The Government sought to justify the admission of the testimony on the grounds that defense counsel failed to object "with adequate clarity" and the Tate-Walder doctrine permitted its use for impeachment purposes. (Slip opinion at 5-7) However, the Blair court rejected both of these contentions, finding that a brief objection was sufficient and that

the Tate-Walder doctrine is irrelevant where a Miranda problem is presented.(Id. at 6, 8)

The factual setting of Blair is strikingly similar to the instant case and that decision should control the disposition of this appeal.* In Blair, the defendant's statement was made in violation of Miranda and the court determined that it should not have been admitted in rebuttal. In the instant case the appellant's statement to Officer Brancato, if a Jackson hearing had been held, may have been found to be involuntary and therefore inadmissible rebuttal testimony.** Merely because a different basis for exclusion is used does not destroy the logic of the Blair decision that the appellant's statement cannot be used in rebuttal for impeachment purposes. Therefore the Government's argument that the Tate-Walder doctrine permits its use is clearly erroneous and should be rejected.

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* While there was an objection to the use of the statement made in the Blair case, absence of such objection in this case does not preclude the recognition of plain error on appeal. Fed. R. Crim. P. 52(b)

**Cf. Alston v. United States, 348 F.2d 72 (D.C. Cir. 1965); Spriggs v. United States, 335 F.2d 283 (D.C. Cir. 1964) While both of these cases involve violations of the Mallory rule, Mallory v. United States, 354 U.S. 449 (1957), they do suggest that, even if a person is warned of his rights by the police, the statement may be tainted by coercion because the interrogation occurred in a precinct station.

CONCLUSION

For the foregoing reasons, it is submitted that appellant's conviction should be reversed and the case remanded to the court below for appropriate action.

Respectfully submitted,

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